

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Insurance
Agent's License of Thomas C.
Hernandez, License No. 0591865,
the Insurance Agent's License
of Roxanne M. Hernandez, License
No. 0001899 and the Insurance
Agency's License of Mid-America
Health & Life Services, Inc.,
License No. 000624.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on April 7, 1989 in Rose Creek, Minnesota and on October 10, 11, 12, 16 and 17, and November 1, 1989 at the Office of Administrative Hearings, Minneapolis, Minnesota. The record on this matter remained open through March 2, 1990 for the submission of post-hearing memoranda.

Karyn M. (Kim) Greene, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place & Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, Minnesota Department of Commerce. Dennis Briguet, Attorney at Law, 1700 Livingston Avenue, Suite 205, West St. Paul, Minnesota 55118, appeared on behalf of the Respondents, Thomas C. Hernandez, Roxanne M. Hernandez, and Mid-America Health & Life Services, Inc.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of the Minnesota Department of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Thomas Borman, Commissioner, Minnesota Department of Commerce, 133 East Seventh Street, St. Paul, Minnesota 55101.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Thomas C. Hernandez, Roxanne M. Hernandez and Mid-America Health & Life Services, Inc., engaged in conduct which violates Minn. Rules 2790.0500, subps. I and 16, 2795.0500, 2795.0800, subps. IC and 2, 2795.0900, 2795.1000, and 2795.1500 (1989); and/or violated Minn. Stat. 60A.17, subds. 6 and 6c(a)(2), (3), (6) and (9), (b) and (d), 62A.40, 62A.43, subd. I and 62A.44 (1988). Additionally,

whether those violations, if proved, constitute grounds for disciplinary action against Respondents' insurance agents' and agency's licenses and/or imposition of a civil penalty.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Thomas C. Hernandez has been a licensed insurance agent in the State of Minnesota at all times relevant to this proceeding. Mr. Hernandez has been the president and co-owner of Mid-America Health & Life Services, Inc. since he created the agency in 1981.

2. Roxanne M. Hernandez was licensed as an insurance agent in the State of Minnesota from March 26, 1984 to May 31, 1989. She failed to renew her license in May 1989. Ms. Hernandez is the co-owner and vice-president of Mid-America. However, Ms. Hernandez has never worked as an insurance agent and has no responsibilities as vice-president of Mid-America.

3. Mid-America Health & Life Services, Inc. is a corporation that has been licensed as an insurance agency in the State of Minnesota at all times relevant to this proceeding.

Ed and Oliva Merten

4. Ed and Olivia Merten, ages 82 and 85, reside in Rose Creek, Minnesota. In June of 1987, the Mertens had two United American Medicare supplement policies in force which they purchased from Ronald Geertsema in December of 1986. Clayton Tanner, an insurance agent who later worked for Tom Hernandez in 1988, sold them two Central States of Omaha (C.S.O.) Medicare supplement policies on June 10, 1987. On September 25, 1987, the Mertens purchased a third Medicare supplement policy from Reid Johnson and Brad Hansen issued by Continental General Insurance Company. Johnson and Hansen took the Mertens C.S.O. policies, telling them that they would send the policies in for a refund. However, because the grace period had passed, a refund was not available.

5. In October of 1987, shortly after buying the Continental General policies, Olivia Merten called Ron Geertsema with questions about their purchases. Geertsema visited the Mertens at their home and discovered that they each had three current Medicare supplement policies: his United American policies in effect until December 1987; the C.S.O. policies in effect until June 1988; and the Continental General policies purchased in September 1987, to be effective through the fall of 1988. Ron Geertsema advised the Mertens that they could get a refund on the Continental General policies due to the 30-day grace period, and gave them assistance in cancelling the policies. The Mertens sent their Continental General policies in for a refund and also allowed their United American policies to lapse in December of 1987. This left them with only the C.S.O. policies in effect in January of 1988.

Geertsema had informed the Mertens that he would stop by their home in April of 1988 to update their Medicare supplement coverage.

6. On March 22, 1988, Tom Hernandez went to the Mertens' home to sell them insurance. During Hernandez' insurance presentation to Mr. and Mrs.

Merten, the Mertens informed Hernandez that they had another agent, Ronald Geertsema, who they were doing business with. They informed Hernandez that Geertsema had assisted them the previous fall when they had a problem with duplicate Medicare supplement coverage. The Mertens told Hernandez that they planned to buy insurance from Mr. Geertsema and that he was going to stop by in April. The business card which Geertsema left with the Mertens showed a South Dakota business address. However, Mr. Geertsema lived and worked out of Round Lake, Minnesota and was licensed in Minnesota. After viewing the business card, Tom Hernandez told the Mertens that: (1) they should not do business with an agent from out of state because it made more sense to have a Minnesota agent; (2) that Mr. Hernandez was taking over Mr. Geertsema's territory for United American; (3) that Geertsema's Minnesota license could be taken away at any time; and (4) that since both men worked for United American, it did not matter who they purchased insurance from because the business would go back to the same source anyway.

7. Ed and Olivia Merten felt "pressured" by Tom Hernandez' insurance sales presentation. Consequently, they purchased a United American Medicare supplement policy and gave Mr. Hernandez a check for \$1,516.00.

8. After purchasing the Medicare supplement policies from Thomas Hernandez, Olivia Merten telephoned Ronald Geertsema and was surprised that he still resided in Minnesota after what Hernandez had told her. Mr. Geertsema told Mrs. Merten that he would stop by in a couple of days to see what they had purchased.

9. On March 31, 1988, Ron Geertsema visited the Mertens and they told him what Hernandez had said regarding his "out of state" business residence and Hernandez' reasons for buying insurance from him. Tom Hernandez had left a business card with the Mertens in their "insurance file" which Geertsema saw. At that time, Mr. Geertsema helped Mrs. Merten draft a "complaint" letter concerning her Medicare supplement insurance policy purchases from Tom Hernandez and Hernandez' representation to them that Ronald Geertsema did not live in Minnesota. Mrs. Merten stated in the letter that their "main concern" was the fact that their check was cashed and they had no copies of the application they had filled out for Tom Hernandez.' Additionally, on March 31, 1988, Ronald Geertsema drafted two complaint letters for the Mertens himself which contained additional information concerning Hernandez' statements to the Mertens. Geertsema had the Mertens sign these letters; one was sent to the Minnesota Department of Commerce and the other to United American Insurance Company. Both letters requested a refund from United American but were dated March 30, 1988. Geertsema drafted a third letter on March 31 which was signed by himself and both Mertens stating that he was in their home on that day to

help them out concerning their insurance policies.

10. The United American complaint letter was received by United American on April 7, 1988. The company called Olivia Merten and confirmed that she had

10ne of the allegations in this case is that Respondent Tom Hernandez did not leave copies of the insurance applications with the Mertens. The Judge has concluded that this allegation has not been proved for the reasons set forth In the Memorandum.

sent the complaint letter and did want a refund. A refund was subsequently sent to the Mertens.

11. The Minnesota Department of Commerce complaint letter was received by the Department on April 4, 1988. On April 12, 1988, a Department investigator, Arloa Molstad, wrote a letter to Tom Hernandez informing him of the Merten complaint and requesting his response. On April 14, 1988, after receiving the letter from Ms. Molstad, Hernandez called Molstad to discuss the Merten complaint. He informed her that he had just completed a phone conversation with the Mertens and that they were happy with the insurance that he had sold them.

12. On April 14, 1988, Mrs. Merten received a phone call concerning the Hernandez complaint. The caller did not identify himself. The caller threatened Mrs. Merten with a lawsuit because of the complaint and told her that she could get into serious trouble if she did not reveal that Ron Geertsema wrote the Department a complaint letter. The caller did identify himself as being from the State of Minnesota. Mrs. Merten felt nervous and frightened because of the phone call. The Judge specifically finds that this caller was either Tom Hernandez or someone calling at his direction.

13. On April 15, 1988, Mrs. Merten called Ron Geertsema concerning the threatening phone call she had received the day before. Mr. Geertsema immediately called Arloa Molstad and informed her of the phone call which Mrs. Merten had received. Molstad then telephoned Olivia Merten to discuss the threatening phone call and assured her that no one from the State had made the call.

14. After speaking with Mrs. Merten and Ms. Molstad on April 15, 1988, Geertsema was telephoned by Tom Hernandez concerning the Department complaint. During the phone call, Geertsema told Hernandez about the threatening phone call Olivia Merten had received. Hernandez told Geertsema that the phone call had been made by his attorney. Hernandez was angry at this time and was convinced that Ronald Geertsema was responsible for the complaint letter filed with the Department.²

15. On March 22, 1988, when Tom Hernandez sold the United American insurance policies to the Mertens, he wrote a "disclaimer" letter which he had them sign. The letter states, in part, that "In no way did Tom high pressure us to do this." At the bottom, Mrs. Merten wrote "We have read this and approve" and signed both her and her husband's name. The Mertens did not understand the contents of this letter and were pressured into signing it by Mr. Hernandez.

²The complaint letters, dated March 30, 1988, were signed by the Mertens

and do not indicate that anyone else drafted the letters. The Mertens could not, or would not, identify who drafted the letters during their testimony except to say that someone besides them did the writing. Mr. Geertsema denied writing the letters during his testimony.

Flora Cole

16. Flora Cole is an 84-year-old woman who resides in Warroad, Minnesota. Tom and Roxanne Hernandez met Flora Cole in the late fall of 1987 when they were in Warroad for a hockey tournament. On that occasion, Mrs. Cole purchased life insurance from Mr. Hernandez.

17. On September 13, 1988, Tom Hernandez again visited Flora Cole in Warroad and sold her a Medico life long-term care policy which required an initial premium of \$1,195.30 and an annual renewal premium of \$1,175.30. During the sales presentation, Mr. Hernandez told Mrs. Cole that, at age 84, this was the last time she could purchase this type of insurance. Additionally, Hernandez stated that the initial premium was the last she would have to pay at her age. At no time did Tom Hernandez tell Flora Cole that she would have to pay an annual renewal premium of \$1,175.30. After the sale was completed, Tom Hernandez drafted a disclaimer letter which stated, in part, that "I realize this is paid once a year." At the bottom of the letter, Flora Cole wrote "I have read this and approve it" and signed her name. The Judge specifically finds that at the time Flora Cole signed the disclaimer, she did not understand that there were annual renewal premiums to be paid on the insurance policy or the contents of the disclaimer letter.

18. After Flora Cole received her insurance policy from Medico in the mail and realized that renewal premiums were due annually, she immediately wrote to Medico requesting a refund. A refund on the policy was sent to her in mid-November.

Francis Ives

19. On February 27, 1986, Tom Hernandez visited Francis Ives, age 76, at her home in Albert Lea, Minnesota. At that time, he sold her a Transport Life life insurance policy with an annual premium of \$970.32 and a face value starting at \$3,000, increasing over an 11-year period to \$6,000. During the sales pitch, Hernandez led Mrs. Ives to believe that only one premium payment was required for the insurance policy. However, at the conclusion of the sale, Tom Hernandez drafted a disclaimer letter which he had Francis Ives sign which stated, in part, "I realize this is paid on a yearly basis." Mrs. Ives did not see very well and had a hard time reading.

20. At that time, Mrs. Ives had liquid, unencumbered assets in the range of \$500,000 to \$550,000. These assets were managed by her son, William Ives, who resided in Colorado, pursuant to a power of attorney.³ Tom Hernandez did not make an inquiry regarding Francis Ives' financial situation at the time the life insurance was sold except for finding out that she did have one small life insurance policy already in effect.

21. William Ives learned that his mother had purchased the life insurance policy from Mr. Hernandez in December of 1986 when his mother was visiting at Christmas time. When Mr. Ives discovered that the policy had an annual

3At the time of this hearing, Mrs. Cole was in a nursing home suffering from Alzheimer's disease and thus, unable to testify or be deposed.

premium, and that the application filled out by Hernandez contained incomplete and inaccurate information regarding his mother's health, he complained to the Minnesota Department of Commerce.

22. When Mrs. Ives received a renewal premium notice from Transport Life Insurance Company, she wrote to her son and explained that Hernandez had informed her that the policy had only a one-premium requirement. Ives asked whether she should cancel the policy or pay the renewal premium.

23. Based on the Ives complaint, and intervention by the Minnesota Department of Commerce, Transport Life made a decision to refund Francis Ives' initial premium payment and cancel the policy even though it had been in effect for approximately one year.

24. At the time she purchased life insurance from Mr. Hernandez, Mrs. Ives had diverticulitis, an ailment of the digestive system for which she had been hospitalized. Ives took daily fiber supplement for this condition. Additionally, Mrs. Ives had progressive scoliosis which she had been suffering from since the time she was 16 years old. In 1986, her back was twisted and her left shoulder blade protruded. This condition was obvious to a layperson.

25. The Transport Life insurance policy application contained a limited number of health questions. Transport Life made its decision whether or not to issue a policy based on the health information contained on the application. The application stated that the company would be bound by the policy only if the information on the application was "full, complete and true".

26. The application filled out for Francis Ives by Tom Hernandez states that Mrs. Ives had diabetes and high blood pressure. However, there was nothing on the application concerning the visible scoliosis or Ms. Ives' diverticulitis. Hernandez stated on the application that Ms. Ives' "present physical condition" was "very good".

27. When Mr. Hernandez learned of Mr. Ives' complaint to the Department of Commerce, he called Mr. Ives at his home. Hernandez was very angry during the phone conversation, yelling and threatening to sue Mr. Ives and even go to Colorado to "see" him.

Andrew Schoenecker

28. Since 1984, Andrew Schoenecker, age 92, who resides in Eden Valley, Minnesota, has purchased Medicare supplement policies from Respondent Tom Hernandez and two other Mid-America agents, Thomas M. Hernandez, Respondent's son, and Robert Koelfgen. In June of 1984, Mr. Schoenecker had two Medicare

supplement policies which he purchased from Robert Koelfgen. In July of that year, Koelfgen signed a contract with Respondent Tom Hernandez authorizing him to sell insurance for Hernandez' agency. On October 26, 1984, Respondent Tom Hernandez visited Andrew Schoenecker and sold him a Guaranty Trust Life Insurance Company, Category 2, Medicare supplement policy. In addition to the two Medicare supplement policies purchased from Mr. Koelfgen, Mr. Schoenecker had a third Medicare supplement policy in force through Blue Cross Blue Shield. Of the three policies already in force when Hernandez sold Schoenecker the Guaranty Trust life policy, only one policy was due to lapse within six months. The Guaranty Trust life policy had a clause providing that it would not cover preexisting conditions for the first six months the policy was in force.

29. The application which Mr. Hernandez filled out when he sold Schoenecker the GTL policy in 1984 states that the policy is replacing a Medico Life policy, number B19578. Mr. Hernandez obtained the Medico Life policy number from a Medico policy and application which Mr. Schoenecker had in his home. The Medico application is signed by Robert Koelfgen and states that Mr. Schoenecker had two Medicare supplement policies in force at the time he purchased the Medico life policy from Mr. Koelfgen. Mr. Hernandez did not determine the extent of Mr. Schoenecker's existing insurance coverage when he sold him the GTL policy.

30. On August 12, 1986, Mr. Koelfgen, who was still affiliated with Mid-America, saw Andrew Schoenecker and replaced the GTL policy purchased from Mr. Hernandez with a United American Medicare supplement policy. In November of 1986, Mr. Koelfgen's affiliation with Mid-America ended.

31. On January 7, 1987, Mr. Hernandez replaced the United American policy sold by Mr. Koelfgen with a GTL policy. In December 1987, Respondent's son, Thomas M. Hernandez, replaced the GTL, Category 2, Medicare supplement policy sold by his father with a Medico Life, Category 2, Medicare supplement policy. At this time, Thomas M. Hernandez worked for his father at Mid-America. Respondent Tom Hernandez learned that his son had sold Mr. Schoenecker a Medico Life, Category 2, Medicare supplement policy when his son brought the application into the office. Respondent did not inquire concerning the fact that his son was replacing a Category 2 policy with a Category 2 policy.

32. At the time Respondent Tom Hernandez sold the GTL policy to Mr. Schoenecker in January 1987, Schoenecker had the Blue Cross Blue Shield policy in effect and also two policies sold to him by Robert Koelfgen. When Respondent Tom Hernandez received the application for the Medico Life policy sold by his son, Schoenecker had the GTL policy in effect, the United American policy sold to him by Robert Koelfgen in effect, and the Blue Cross Blue Shield policy in effect.

33. At the time Mr. Schoenecker purchased the GTL and Medico Life policies, he had very poor vision due to cataracts in his eyes, one of which was operated on with marginal success in September 1987. He wore hearing aids in both ears, was physically weak, and was extremely forgetful.

34. In January of 1987, when Respondent Tom Hernandez sold the GTL policy to Mr. Schoenecker, Hernandez had Mr. Schoenecker sign a disclaimer letter which reads, in pertinent part, "I have no other medical supplement in force with any other companies other than UA [United American] which I am dropping."

35. In February 1988, approximately two months after Thomas M. Hernandez sold Mr. Schoenecker the Medico Life policy, Schoenecker renewed the GTL policy. A renewal commission of \$183.18 was credited to the Mid-America/Tom Hernandez account. In December of 1988, Mr. Schoenecker renewed the Medico Life policy. The Mid-America account was credited with \$175.23. Respondent Tom Hernandez is solely responsible for maintaining all of Mid-America's

records and he does all of the bookkeeping himself. Respondent handles all communications with insurance companies on behalf of himself and Mid-America as the general agent under contract with the insurance companies. He credits all of the commissions earned and essentially runs Mid-America single-handedly.

Mr. Hernandez received commission statements from GTL and Medico Life indicating that the Schoenecker policies were renewed and that the Mid-America account was credited.

36. In addition to the two Medicare supplement policies (GTL and Medico) in effect for Mr. Schoenecker in 1988, he also had Medico supplement coverage through a United American policy sold by Robert Koelfgen and the Blue Cross Blue Shield policy. Hernandez did not receive any documentation evidencing the existence of the latter two policies, however.

Katherine Menglekoch - I - Team

37. In early November of 1988, Respondents Tom Hernandez and Roxanne Hernandez went to the home of Katherine Menglekoch to sell her Medicare supplement insurance. Mrs. Menglekoch was working for the WCCO I-Team and did not intend to purchase insurance. Mr. Hernandez did not know Mrs. Menglekoch had called him on behalf of the I-Team. He believed she was a potential insurance customer and he would have sold her Medicare supplement insurance if she had wanted to purchase it. Mr. Hernandez' sales presentation to Mrs. Menglekoch was videotaped with a hidden camera and portions of it were later shown on the Channel 4 I-Team news report.

38. Medicare provides some, but not full coverage for most doctors' bills. Medicare divides doctors' bills into two categories, bills Medicare never pays such as bills for routine physicals, and bills Medicare pays some portion of. If a doctor's bill is of the first type, Medicare will pay nothing and a Medicare supplement policy will also pay nothing. If a doctor's bill is of the second type, Medicare will pay a portion of the doctor's fee. Medicare determines an amount which it views as reasonable for a particular doctor's service. This amount is called the Medicare Allowable Charge. Medicare will pay 80% of this amount toward the payment of a doctor's actual bill. The difference between the actual bill and the 80% of the Medicare Allowable Charge paid by Medicare is the consumer's responsibility. The senior citizen consumer can purchase Medicare supplement policies in order to help pay for the gap between the doctor's actual bill and the amount paid by Medicare. A Medicare supplement policy may, or may not, fill the entire gap depending on how much more the doctor's bill is than the Medicare Allowable Charge.

39. Mr. Hernandez presented four Medicare supplement policies to Mrs. Menglekoch. During the entire course of the sales presentation, Roxanne Hernandez said nothing. Thomas Hernandez made the following statements or omissions concerning the coverage contained in the four Medicare supplement policies: (1) he did not inform Mrs. Menglekoch that there was no coverage provided under the policies for some doctors' services such as routine physicals, eyeglasses, or hearing aids; (2) that the first policy presented would be 95% of the difference between the actual doctor's bill and the amount paid by Medicare; and (3) that the policies would pay the difference between

what Medicare paid and the actual bill so that 100% of the doctors' bills would be paid. Depending on the difference between the actual doctor's bill and the Medicare Allowable Charge, these statements may or may not have been true. Mr. Hernandez knew, at the time he made the sales presentation to Mrs Menglekoch, that the statements he made were not necessarily true with respect to all doctors' bills.

40. Tom Hernandez referred to two types of nursing home coverage in his insurance presentation to Mrs. Menglekoch. He discussed the nursing home coverage provided under Medicare supplement policies and compared that coverage to the coverage provided in a Medico Life long-term care policy. Nursing home care is divided into three categories: skilled care, intermediate care and

custodial care. Medicare only provides coverage for skilled care. A Medicare supplement policy with nursing home coverage is designed to fill the gap between what Medicare pays for skilled care and what the nursing home charges, It provides no coverage for intermediate and custodial care. In contrast, a long-term care policy provides coverage for skilled, intermediate, custodial, and in some cases, home-based care. To qualify as skilled care under Medicare, the care must be provided to an individual who was in the hospital for at least three days, was transferred to a nursing home for treatment of the same ailment within a specified number of days after being released, and is monitored daily by a registered nurse pursuant to a physician's care plan. Many ailments or conditions require only intermediate and custodial nursing home care and not skilled care. A long-term care policy provides nursing home coverage in more situations than a Medicare supplement policy. Mr. Hernandez stated to Mrs. Menglekoch that the Medicare supplement policies would provide a year in the nursing home without explaining that they only provide coverage for skilled care. At the time Mr. Hernandez made that statement to Mrs. Menglekoch, he knew of the difference between the coverage provided by Medicare supplement policies and by long-term care policies.

41. During his presentation concerning nursing home coverage, Mr. Hernandez stated to Mrs. Menglekoch that she could receive coverage equivalent to the coverage provided by the Medico Life long-term care policy by purchasing the Medicare supplement policy and that she would save herself \$800 in the process. Mr. Hernandez knew that this comparison was inaccurate.

42. Tom Hernandez told Mrs. Menglekoch that the Medicare coverage for skilled nursing home care would decrease rather than increase when the catastrophic health care law went into effect on January 1, 1989. However, the change in the law actually resulted in an increase in Medicare coverage for skilled nursing home care.

Complaint Records

43. In early August of 1988, pursuant to a request from the Department of Commerce, Tom Hernandez brought his file to the Department which contained his agency's complaint records relating to informal complaints made to insurance companies and formal complaints made to the Department. This file was inventoried by investigators at the Department. The investigators found documents concerning 22 complaints against Mid-America agents other than Tom Hernandez and seven complaints involving Tom Hernandez. All of the documents

in the file related to formal complaints made to the Department. None of the documents evidenced informal complaints made only to insurance companies.

44. Department of Commerce complaint files revealed four complaints against Respondent Tom Hernandez for which Mr. Hernandez had no complaint records. There were 15 complaints against other Mid-America agents for which Tom Hernandez had no complaint records. Respondent was aware of additional complaints against Mid-America agents for which he had no records although he did have access to the complaint files at the insurance companies.

Inadequate Supervision

45. Respondents Tom and Roxanne Hernandez are the president and vice-president, sole owner of Mid-America. Roxanne Hernandez was the general agent

for United American until that contract was terminated following the I-Team and Merten complaints. Tom Hernandez was a general agent with Transport Life, Guaranty Trust Life, Medico Life, Continental General, and North American Equitable insurance companies. As general agents appointed by these companies, Tom and Roxanne Hernandez signed contracts with other insurance agents to solicit applications for insurance on behalf of Respondents.

46. From 1981 to the present, Tom Hernandez has not established or formulated any kind of written documentation designed to ensure the proper supervision of agents regarding compliance with insurance laws and rules of the State of Minnesota. Roxanne Hernandez also had no written procedures designed to ensure compliance with the law for subagents with whom she had a contractual relationship.

47. Before entering into an agency relationship with insurance salesmen on behalf of Respondents and Mid-America, Tom Hernandez did not inquire about any current complaints or disciplinary history. Mr. Hernandez hired Don Reynolds in May of 1988 knowing that Mr. Reynolds had been suspended for six months in 1985 while working for Mid-America and that Mr. Reynolds was suspended for six months just prior to signing the 1988 contract with Mid-America. Tom Hernandez did not inquire about the reason for the 1988 suspension or provide Reynolds with any special supervision after he became re-employed at Mid-America. In November of 1988, Tom Hernandez signed a contract with David Schmidt making Mr. Schmidt's entire insurance agency a subagent under Mid-America. Mr. Hernandez knew at the time he signed the contract that Mr. Schmidt's license had been suspended for one year at an earlier date and that one of Schmidt's agents, Randy Sachs, had had his license suspended for a period of time. Hernandez did not inquire as to whether there were any current complaints against Mr. Schmidt or his agents.

48. Tom Hernandez routinely received notices from insurance companies when a policy was cancelled and a refund made. Cancellations and refunds made after the 30-day grace period expires are based primarily on complaints and occasionally on inaccurate health histories. When Mr. Hernandez received notice that an insurance company had cancelled and refunded a policy purchased from a Mid-America agent, he did no further investigation to determine the basis for the company's decision and to determine whether agent misconduct was involved. Insurance companies normally allow a general agent access to their complaint files.

49. Over approximately the past eight years, Tom Hernandez has contracted with four subagents who have produced a substantial amount of business for his agency. From 1984 to 1987, the Department received at least 26 formal complaints which were filed against these four subagents. Of these four agents, one had had two six-month suspensions, one had lost his license because he failed to pay Minnesota income taxes, one had been suspended for two weeks while working at Mid-America and then lost his license after leaving

Mid-America; and one had numerous informal complaints filed against him by Transport Life customers. These four individuals were relied upon by Mr. Hernandez to recruit and help train new agents.

Roxanne Hernandez

50. Roxanne Hernandez was an insurance agent and a general agent with United American in name only. She never sold any insurance policies, she was

not familiar with United American policies, she was unable to give an accurate and thorough insurance presentation, she did not work as an insurance agent and when she signed United American contracts, she did so at Respondent Tom Hernandez' direction. As the general agent under contract with United American, Roxanne Hernandez did receive payment when United American subagents under contract with Mid-America made insurance sales. Roxanne Hernandez also had some contact with United American regarding cancellations and refunds. Although Ms. Hernandez was present during her husband's insurance presentation to Katherine Menglekoch, she did not inform Mrs. Menglekoch that any of these statements made by her husband were inaccurate or incomplete.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of the Minnesota Department of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 60A.17, subd. 6c and 14.50.

2. The Notice of Hearing issued by the Department was proper and the Department has fulfilled all relevant substantive and procedural requirements of law or rule.

3. Pursuant to Minn. Rule 1400.7300, subp. 5, the Department of Commerce must prove the allegations at issue herein by a preponderance of the evidence.

4. Minn. Stat. 60A.17, subd. 6 and subd. 6c(a)(2) provide that no insurance agent shall "willfully misrepresent to any person . . . the condition or manner of doing business of any insurer or agent Respondent Tom Hernandez violated this provision by the conduct set forth in Finding 6. Even though Mr. Hernandez may not have actually known that Ronald Geertsema lived in Minnesota, the rest of his statements concerning Geertsema and the insurance transaction constitute a violation of this statutory provision.

5. Minn. Rule 2790.0500, subp. 1 provides that "no advertisement or representation, written or oral, may omit information or use words, phrases, statements, references, or illustrations if the omission of the information or use of the words, phrases, statements, references, or illustrations has the capacity, tendency, or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy benefit payable, loss covered, or premium payable." Respondent Tom Hernandez violated this rule by the conduct set forth in Findings 17, 19, and 39-41.

6. Minn. Rule 2790.0500, subp. 16 prohibits an insurance agent from making "misleading payment claims" unless those claims are "literally true." Respondent Tom Hernandez violated this rule by the conduct set forth in Finding 39.

7. Minn. Rule 2795.0800, subp. 1C. requires that "supervising agents shall have the duty to ensure that contracted, employed or engaged agents .

. .
comply with laws and rules of the Department of Commerce." Subpart 2 of that rule states that "a supervising agent must establish, maintain, and enforce written procedures which will ensure proper supervision of the activities of

each agent and compliance with insurance laws and rules." Respondents Tom and Roxanne Hernandez have violated these rule provisions by the conduct set forth in Findings 45 through 49.

8. Minn. Rule 2795.0900 requires that when an insurance agent recommends the purchase of an insurance policy to a customer, he must make reasonable inquiries to determine whether the policy is suitable for that individual. Respondent Tom Hernandez violated this rule by the conduct set forth in Findings 19 and 20.

9. Minn. Rule 2795.1500 requires that "every agent and agency must compile and maintain a separate complaint file for each agent against whom a complaint, grievance, or allegation is made." Respondents Tom Hernandez, Roxanne Hernandez and Mid-America violated this rule by the conduct set forth in Findings 43 and 44.

10. Minn. Stat. 62A.43, subd. 1 prohibits an insurance agent from selling a Medicare supplement plan to a "person who currently has one plan in effect" unless the "second plan is not made effective any sooner than necessary to provide continuous benefits for preexisting conditions." Additionally, the statute requires that "every application for Medicare supplement insurance shall require a listing of all health and accident insurance maintained by the applicant as of the date the application is taken." Respondent Tom Hernandez violated these statutory provisions by the conduct set forth in Findings 28 through 32.

11. Minn. Stat. 60A.17, subd. 6c(a)(6) prohibits the "misrepresentation of the terms of any actual or proposed insurance contract" Respondent Tom Hernandez violated this statutory provision by the conduct set forth in Findings 17, 19, and 39 through 41.

12. Minn. Stat. 60A.17, subd. 6c(a)(3) provides that disciplinary action may be taken against an agent's or agency's license if the Commissioner finds that the licensee has violated or not complied with any insurance law or rule. Respondents Tom Hernandez, Roxanne Hernandez and Mid-America Health & Life Services, Inc. have violated this statutory provision due to the violations set forth above.

13. Minn. Rule 2795.1000 requires that every insurance agent "must observe high standards of commercial honor and just and equitable principles of trade in the conduct of the agent's insurance business." Respondent Tom Hernandez has violated this rule by the conduct set forth in Findings 12, 15, 17, 19, 24 through 26, 27, and 33-34.

14. Minn. Stat. 60A.17, subd. 6c(a)(9) prohibits a licensee from using

"fraudulent, coercive, or dishonest practices" or be found to be
"incompetent,
untrustworthy, or financially irresponsible" Respondents Tom
Hernandez
and Roxanne Hernandez have violated this statutory provision based upon the
violations found above.

15. The violations above constitute sufficient grounds to take
disciplinary action against Respondents' insurance agents' and agency's
licenses or to impose a civil penalty, or both, pursuant to Minn. Stat.
60A.17, subd. 6c(a).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against Respondents' licenses and/or impose a civil penalty pursuant to Minn. Stat. 60A.17, subd. 6c(a).

Dated this 26 day of March, 1990.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Court reported, transcript prepared.

MEMORANDUM

Most of the violations found above flow clearly from the Findings of Fact enumerated in each Conclusion. However, some issues raised will be discussed below.

The Department has alleged that Respondent Tom Hernandez violated Minn. Rule 2795.0500 and Minn. Stat. 62A.44 because he did not leave a signed and completed copy of the application for insurance filled out by Ed and Olivia Merten with them after the purchase was made. Approximately ten days after Tom Hernandez made the insurance sale to the Mertens, Ronald Geertsema visited their home. The Judge has found that Mr. Geertsema drafted complaint letters for the Mertens which he predated even though the Mertens and Mr. Geertsema deny that he wrote those letters. The Judge will not surmise what could have happened to the applications left with the Mertens but has concluded that the Department did not prove this allegation by a preponderance of the evidence.

The Department has alleged that Respondent Tom Hernandez violated Minn.

Stat. 62A.40 because he was aware his son had sold a "replacement" Medicare supplement policy to Andrew Schoenecker. However, the statute specifically permits the replacement of coverage if certain conditions are met. It was Tom Hernandez' son, Thomas M. Hernandez, who sold the policy and replaced the coverage. Consequently, it was the son who may have violated this statute, not

the father. Respondent Tom Hernandez' failure to make sufficient inquiries of his son may constitute a lack of supervision, but not a violation of Minn. Stat. 62A.40 with respect to the son's sale of insurance to Mr. Schoenecker.

Tom Hernandez had several of his customers sign disclaimer letters which, on their face, appear to rebut some of the allegations herein (Merten, Cole, Ives, and Schoenecker). However, the Judge has given these disclaimers very little weight due to the obvious inability of some purchasers to read and comprehend the letters and the fact that these letters were a part of the "sales pitch". Of those purchasers who were able to testify, all stated that they were unaware of what they had signed and some did not even remember signing the document. Thus, the Judge has greatly discounted the disclaimer letters.

P.C.E.